

one which is not. The fact that the Special Prosecutor's claim of need for information needed in a pending criminal trial was based on the fifth amendment guarantee of due process of law and the sixth amendment right to be confronted with witnesses against him and have compulsory process (subpenas) for obtaining witnesses in his favor was accorded great weight by the court in balancing the need for evidence against the requirement of confidentiality. Linking these constitutional bases to the responsibilities of the judicial branch tipped the balance in favor of requiring the President to submit subpoenaed materials for a judicial inspection.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty on the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. . . .

To read the Art. II powers of the President as providing [such] privilege [on the basis merely of] a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.<sup>(5)</sup>

Additional factors in the decision were the court's unwilling-

ness to conclude that advisors would temper the candor of their remarks because of the possibility of occasional disclosure;<sup>(6)</sup> and its belief that a judge in chambers could protect the confidentiality of Presidential communications consistent with the fair administration of justice.<sup>(7)</sup>

## § 5. Legislation to Obtain Information

Some statutes require agencies to provide information to selected committees. An executive agency, on the request of the Committee on Government Operations of the House, or any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, is required to submit any information requested of it relating to any matter within the jurisdiction of the committee.<sup>(8)</sup>

The Atomic Energy Commission is required to keep the Joint Committee on Atomic Energy fully and currently informed with respect to all commission activities.<sup>(9)</sup> The

5. *U.S. v. Nixon*, at 707.

6. *U.S. v. Nixon*, at 712.

7. *U.S. v. Nixon*, at 714.

8. 5 USC §2954; Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 413.

9. 42 USC §2252; Aug. 1, 1946, c. 724, §202, as added Aug. 30, 1954, c.

Department of Defense is required to keep the joint committee fully and currently informed with respect to all matters within the department relating to the development, utilization, or application of atomic energy. Any government agency is required to furnish any information requested by the joint committee with respect to the activities or responsibilities of that agency in the field of atomic energy.<sup>(10)</sup>

Other statutes encourage government personnel, as distinguished from departments and agencies to supply information to Congress. The right of federal employees, individually or collectively, to furnish information to either House of Congress or to a committee or member thereof, may not be interfered with or denied.<sup>(11)</sup> Upon the request of a congressional committee, joint committee, or member of such

committee, an officer or employee of the Department of State, the U.S. Information Agency, the Agency for International Development, the U.S. Arms Control and Disarmament Agency, or any other department, agency, or independent establishment of the U.S. government primarily concerned with matters relating to foreign countries or multilateral organizations, may express views and opinions and make recommendations if the request of the committee or member of the committee relates to a subject within the jurisdiction of that committee.<sup>(12)</sup>

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### *Concurrent Resolution*

**§ 5.1 The Senate approved a concurrent resolution to establish a procedure assuring Congress the full and prompt production of information requested from federal officers and employees but the procedures therein never became effective since not approved by the House.**

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1073 §1, 68 Stat. 956, and amended Sept. 6, 1961, Pub. L. 87-206, §17, 75 Stat. 479; Mar. 26, 1964, Pub. L. 88-294, 78 Stat. 172. By Pub. L. 93-438, the AEC was abolished and its functions transferred to the Nuclear Regulatory Commission and the Energy Research and Development Administration. The jurisdiction of the joint committee was eliminated in the 95th Congress.

10. *Id.*

11. 5 USC §7102; Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 523.

12. 2 USC §194a; Pub. L. 92-352, title V, §502, July 13, 1972, 86 Stat. 496, amended Pub. L. 93-126, §17, Oct. 18, 1973, 87 Stat. 455.

On Dec. 18, 1973,<sup>(13)</sup> the Senate by voice vote approved Senate Concurrent Resolution 30:

Whereas the withholding from either House of Congress, or from the committees of Congress and subcommittees thereof by officers or employees of the United States of any information, including testimony, records, or documents, or other material requested by the Congress in order to enable it to exercise a legislative function under the Constitution erodes the system of checks and balances prescribed by the Constitution, unless such withholding is justified by the President to the Congress and, if necessary, determined by the Judiciary to be proper: Now, therefore, be it

*Resolved by the Senate (the House of Representatives concurring),* (a) That, when an officer or employee of the United States is summoned to testify or to produce information, records, documents, or other material before either House of Congress or a committee of the Congress or subcommittee thereof, that officer or employee shall appear at the time and place specified and shall answer all questions propounded to him, or produce all information, including records, documents, and other material sought, unless, in the case of an officer or employee of a Federal agency in the executive branch, either within twenty days of the date of the summons, or, in the case of any such information which was first requested at an appearance, within ten days after that appearance, the President formally

and expressly instructs the officer or employee in writing to withhold the information requested, including answers to specific questions, or specific records, documents, or other material, in which event such Presidential instruction shall set forth the grounds on which it is based.

(b) Each written Presidential instruction pursuant to subsection (a) shall be transmitted to the House of Congress or committee of the Congress or subcommittee thereof requesting the information, proposing the questions, or seeking the records, documents, or other material.

Sec. 2. (a) If a House of Congress or a committee of Congress—

(1) determines that an officer or employee of the United States has failed to comply with the provisions of section 1(a); or

(2) upon consideration of the Presidential instruction transmitted pursuant to section 1(b), determines that the information requested is needed to enable it to exercise a legislative function under the Constitution, it shall prepare a written report setting forth such determination. In the case of a committee, the chairman is authorized, subject to the approval of the committee, to issue a subpoena requiring such officer or employee to appear before the committee at a time specified and to provide the information requested by answering the question or questions propounded and to produce any information, including records, documents, or other material requested. In the case of a House of Congress, the majority or minority leader shall introduce a resolution citing such determination and authorizing the ma-

13. 119 CONG. REC. 42105, 42106, 93d Cong. 1st Sess., see also S. REPT. No. 93-613.

jority or minority leader of that House to issue a subpoena requiring such officer or employee to appear before such House and to provide the information requested by answering the question or questions propounded and to produce any information, including records, documents, or other material requested.

(b) If a committee of the Congress, or the majority or minority leader of a House of Congress determines that an officer or employee of the United States has failed to comply with a subpoena issued pursuant to subsection (a) within fifteen days after such officer or employee receives such subpoena, the chairman of such committee or the majority or minority leader of such House shall file—

(1) in the case of a House of Congress, a resolution with such House;

(2) in the case of a joint committee, a concurrent resolution with both Houses of Congress; and

(3) in the case of a committee, a resolution with its House of Congress; with a report and record of the proceedings relating to such subpoena. Congress, in the case of any such concurrent resolution, and the House of Congress with which any such resolution is filed, shall take such action as it deems proper with respect to the disposition of such concurrent resolution or resolution.

(c)(1) A resolution introduced pursuant to subsections (a) or (b) shall not be referred to a committee and shall be privileged business for immediate consideration. It shall at any time be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consider-

ation of the resolution. Such motion shall be highly privileged and not debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) If the motion to proceed to the consideration of the resolution is agreed to, debate thereon shall be limited to two hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(3) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

Sec. 3. (a) Each House of Congress and each committee or subcommittee of the Congress shall take appropriate measures to insure the confidentiality of any information made available to it which, in the judgment of the Federal agency providing it and the House of Congress or committee or subcommittee of the Congress receiving it, requires protection against disclosure which would endanger (1) personal privacy, (2) trade secrets or confidential commercial or financial information, or

(3) the conduct of the national defense, foreign policy, or law enforcement activities.

(b) The Select Committee on Standards and Conduct of the Senate shall investigate any breach of confidentiality of information made available under this part by a Member or employee of the Senate, and the Committee on Standards of Official Conduct of the House of Representatives shall investigate any breach of confidentiality of information made available under this part by a Member or employee of the House of Representatives. Such committee shall recommend appropriate action such as censure or removal from office or position.

Sec. 4. For purposes of this resolution:

(1) The term "committee of the Congress" means any joint committee of the Congress or any standing committee, special committee, or select committee of either House of Congress.

(2) The term "Federal agency" has the same meaning given that term under section 207 of the Legislative Reorganization Act of 1970 and includes the Executive Office of the President.

Sec. 5. (a) Nothing in this resolution shall be construed to require the furnishing or production of any information, records, documents, or other material to either House of Congress if such furnishing or production is prohibited by an Act of Congress.

(b) Nothing in this resolution shall be construed as in any way impairing the effectiveness or availability of any other procedure whereby Congress may obtain information needed to en-

able it to exercise a legislative function under the Constitution.

The final disposition of this resolution (S. Con. Res. 30) in the House was referral to the Committee on Rules by the Speaker.

### ***Bill***

**§ 5.2 The Senate approved a bill, not acted upon by the House, known as the Congressional Right to Information Act to establish a procedure assuring full and complete disclosure of information requested from federal officers and employees.**

On Dec. 18, 1973,<sup>(14)</sup> the Senate approved S. 2432:<sup>(15)</sup>

That this Act may be cited as the "Congressional Right to Information Act".

Sec. 2. (a) Title III of the Legislative Reorganization Act of 1970 is amended by adding at the end thereof the following new part:

#### **PART 4—KEEPING THE CONGRESS INFORMED**

##### **INFORMING CONGRESSIONAL COMMITTEES**

Sec. 341. (a) The head of every Federal agency shall keep each committee of the Congress and the subcommittees thereof fully and cur-

14. 119 CONG. REC. 42101-05, 93d Cong. 1st Sess.

15. See S. Rept. No. 93-612 for the report on the bill.

rently informed with respect to all matters relating to that agency which are within the jurisdiction of such committee or subcommittee.

(b) The head of a Federal agency, on request of a committee of the Congress or a subcommittee thereof or on request of two-fifths of the members thereof, shall submit any information requested of such agency head relating to any matter within the jurisdiction of the committee or subcommittee.

#### PRODUCTION OF INFORMATION

Sec. 342. (a) When an officer or employee of the United States is summoned to testify or to produce information, records, documents, or other material before either House of Congress or a committee of the Congress or subcommittee thereof, that officer or employee shall appear at the time and place specified and shall answer all questions propounded to him, or produce all information, including records, documents, and other material sought, unless, in the case of an officer or employee of a Federal agency in the executive branch, either within twenty days of the date of the summons, or, in the case of any such information which was first requested at an appearance, within ten days after that appearance, the President formally and expressly instructs the officer or employee in writing to withhold the information requested, including answers to specific questions, or specific records, documents, or other material, in which event such Presidential instruction shall set forth the grounds on which it is based.

(b) Each written Presidential instruction pursuant to subsection (a) shall be transmitted to the House of Congress or committee of the Congress or subcommittee thereof requesting the information, proposing the questions, or seeking the records, documents, or other material.

#### SUBPENA OF INFORMATION

Sec. 343. (a) If a House of Congress or a committee of Congress—

(1) determines that an officer or employee of the United States has failed to comply with the provisions of section 342(a); or

(2) upon consideration of the Presidential instruction transmitted pursuant to section 342 (b), determines that the information requested is needed to enable it to exercise a legislative function under the Constitution it shall prepare a written report setting forth such determination. In the case of a committee, the chairman is authorized, subject to the approval of the committee, to issue a subpoena requiring such officer or employee to appear before the committee at a time specified and to provide the information requested by answering the question or questions propounded and to produce any information, including records, documents, or other material requested. In the case of a House of Congress, the majority leader shall introduce a resolution citing such determination and authorizing the majority leader of that House to issue a subpoena requiring such officer or employee to appear before such House and to provide the information requested by answering the question or questions propounded and to produce any information, including records, documents, or other material requested.

(b)(1) If a committee of the Congress determines that an officer or employee of the United States has failed to comply with a subpoena issued pursuant to subsection (a) within fifteen days after such officer or employee receives such subpoena, the chairman of such committee is authorized, subject to the provisions of paragraph (2), to bring a civil action in the United States District Court for the District of Columbia to enforce such subpoena.

(2) If a committee of the Congress referred to in paragraph (1) deter-

mines that the chairman of such committee should institute a civil action in the United States District Court for the District of Columbia to enforce the subpoena issued by it pursuant to subsection (a), the chairman shall introduce a resolution in the House or Houses of Congress concerned citing the failure to comply with the subpoena of the committee and authorizing the chairman to bring a civil action in such purpose. If such resolution is agreed to by the House or Houses of Congress concerned, the chairman shall institute a civil action in the United States District Court for the District of Columbia to enforce the subpoena.

(c) If a House of Congress determines that an officer or employee of the United States has failed to comply with a subpoena issued pursuant to subsection (a) within fifteen days after such officer or employee receives such subpoena, the majority or minority leader of that House shall introduce a resolution citing such failure to comply and authorizing the majority or minority leader of that House to bring a civil action in the United States District Court for the District of Columbia to enforce such subpoena.

(d)(1) A resolution introduced pursuant to subsections (a), (b) (2), or (c) shall not be referred to a committee and shall be privileged business for immediate consideration. It shall at any time be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. Such motion shall be highly privileged and not debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) If the motion to proceed to the consideration of the resolution is agreed to, debate thereon shall be limited to two hours, which shall be

divided equally between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(3) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

(e) The provisions of subsection (d) of this section are enacted by the Congress—

(1) as an exercise of the rule-making power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively; and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

#### JUDICIAL REVIEW

Sec. 344. (a) The United States District Court for the District of Columbia shall have original jurisdiction of actions brought pursuant to section 343 of this Act without regard to the sum or value of the matter in controversy. The court shall have power to issue a mandatory injunction or other order as may be ap-

appropriate, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the subpoena issued pursuant to section 343 of this Act.

(b) Any congressional party commencing or prosecuting an action pursuant to this section may be represented in such action by such attorneys as it may designate.

(c) Appeal of the judgment and orders of the court in such actions shall be had in the same manner as actions brought against the United States under section 1346 of title 28, United States Code.

(d) The courts shall give precedence over all other civil actions to actions brought under this part.

#### PROTECTION OF INFORMATION

Sec. 345. (a) Each House of Congress and each committee or subcommittee of the Congress shall take appropriate measures to insure the confidentiality of any information made available to it under this part which, in the judgment of the Federal agency providing it and the House of Congress or committee or subcommittee of the Congress receiving it, requires protection against disclosure which would endanger (1) personal privacy, (2) trade secrets or confidential commercial or financial information, or (3) the conduct of the national defense, foreign policy, or law enforcement activities.

(b) The Select Committee on Standards and Conduct of the Senate shall investigate any breach of confidentiality of information made available under this part by a Member or employee of the Senate, and the Committee on Standards of Official Conduct of the House of Representatives shall investigate any breach of confidentiality of information made available under this part by a Member or employee of the House of Representatives. Such com-

mittee shall recommend appropriate action such as censure or removal from office or position.

#### DEFINITIONS

Sec. 346. For purposes of this part:

(1) The term "committee of the Congress" means any joint committee of the Congress or any standing committee, special committee, or select committee of either House of Congress.

(2) The term "Federal agency" has the same meaning given that term under section 207 of this Act, and includes the Executive Office of the President.

#### SAVINGS PROVISIONS

Sec. 347. (a) Nothing in this part shall be construed to require the furnishing or production of any information, records, documents, or other material to either House of Congress if such furnishing or production is prohibited by an Act of Congress.

(b) Nothing in this part shall be construed as in any way impairing the effectiveness or availability of any other procedure whereby Congress may obtain information needed to enable it to exercise a legislative function under the Constitution.

(b) Title III of the table of contents of the Legislative Reorganization Act of 1970 is amended by adding at the end thereof the following:

#### PART 4—KEEPING THE CONGRESS INFORMED

Sec. 341. Informing congressional committees.

Sec. 342. Production of information.

Sec. 343. Subpoena of information.

Sec. 344. Judicial review.

Sec. 345. Protection of information.

Sec. 346. Definitions.

Sec. 347. Savings provisions.



The final disposition of this measure (Senate Bill 2432) in the House was referral to the Committee on Rules by the Speaker.

### ***Joint Resolution***

**§ 5.3 The House approved a joint resolution, not passed by the Senate, directing all executive departments and agencies of the federal government to make available to committees and subcommittees of the House and Senate information which may be deemed necessary to enable them properly to perform duties delegated to them by the Congress.**

On May 13, 1948,<sup>(16)</sup> the House, after rejecting a motion to recommit on a roll call vote of 145 yeas to 217 nays, approved House Joint Resolution 342 by a roll call vote of 219 yeas to 142 nays. The text of the joint resolution follows:<sup>(17)</sup>

16. 94 CONG. REC. 5822, 80th Cong. 2d Sess.; debate on this joint resolution appears on pp. 5700–43 and 5807–22, on May 12 and 13, 1948, respectively. The report on this measure is H. REPT. NO. 1595.

17. This copy of the joint resolution is the final form which was sent to the Senate, read twice, and referred to the Committee on Expenditures in the Executive Departments. Referral to the committee was the final Senate disposition. The text that ap-

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all executive departments and agencies of the Federal Government created by the Congress, and the Secretaries thereof, and all individuals acting under or by virtue of authority granted said departments and agencies, are, and each of them hereby is, authorized and directed to make available and to furnish to any and all of the standing, special, or select committees of the House of Representatives and the Senate, acting under the authority of any Federal statute, Senate or House resolution, joint or concurrent resolution, such information, books, records, and memoranda in the possession of or under the control of any of said departments, agencies, Secretaries, or individuals as may, by any of said committees, be deemed to be necessary to enable it to carry on the investigations, perform the duties, falling within its jurisdiction, when requested to do so: *Provided*, That said request shall be made only by a majority vote of all the members of the committee voting therefor at a formal meeting of the committee: *And provided further*, That if the committee be a committee created by the Senate, upon approval of the President or President pro tempore of the Senate: *And provided further*, That if the committee making such request be a committee created by or acting under the authority of the House of Representatives, upon approval of the Speaker or Acting Speaker of the House of Representatives, such major-*

appears in the *Congressional Record* is not given here because it was amended several times.

ity vote of the committee to be shown by a certificate of the chairman of the committee, countersigned by the clerk; the approval of the President or President pro tempore of the Senate or the Speaker or Acting Speaker of the House of Representatives to be shown by letter over his signature. Any officer or employee in any such executive department or agency who fails or refuses to comply with a request of any committee of the Congress made in accordance with the foregoing provisions of this section shall, upon conviction thereof, be punished by a fine not exceeding \$1,000 or by imprisonment for not exceeding 1 year, or both, at the discretion of the court.

Sec. 2. When, by virtue of section 1, any committee of the Congress shall have received information, books, records or memoranda from any of the departments, agencies, Secretaries, or individuals in pursuance of a request made under the authority of said section, it shall forthwith, by majority vote of the membership of said committee, determine what, if any, part of such information shall be made public and what part shall be deemed to be confidential, and it shall thereafter be unlawful for any member of said committee or any employee thereof to divulge or to make known in any manner whatever not provided by law to any person any part of the information so disclosed to said committee and which has by said committee been declared to be confidential; and any offense against the foregoing provision shall be a misdemeanor and shall be punished by fine not exceeding \$1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and, if the offender be an em-

ployee of the United States, he shall be dismissed from office or discharged from employment.

Sec. 3. It shall be unlawful for any individual, while or after holding any office or employment under the United States Government, to appropriate or take custody of, for his own unofficial use or the unofficial use of any other person, any papers, documents, or records (other than those which are of a character strictly personal to him) to which he has or had access solely by reason of holding or having held such office or employment. Any individual who willfully violates this section shall, upon conviction thereof, be punished by a fine not exceeding \$1,000, or by imprisonment for not exceeding one year, or both, at the discretion of the court.

Sec. 4. If any provision of this joint resolution, or the application of such provision to any person or circumstance, is held invalid, the remainder of the joint resolution, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 5. Nothing contained herein shall alter the procedure for inspection of tax returns by committees of Congress prescribed by section 55d of the Internal Revenue Code: *Provided*, That nothing herein contained shall alter any provision of law which expressly protects from disclosure specified categories of information obtained by executive departments and agencies.

Sec. 6. This joint resolution shall become effective on the tenth day after the date of its enactment.

This joint resolution was passed subsequent to President Truman's

refusal to permit the Secretary of Commerce to respond to a resolution of inquiry requesting a letter from the Director of the Federal Bureau of Investigation to the

Secretary regarding the loyalty file on Dr. Edward U. Condon, Director of the National Bureau of Standards.<sup>(18)</sup>

### C. PROCEDURE; HEARINGS

#### § 6. Limitations on Authority to Investigate—Pertinence of Inquiry

Limitations on the authority to investigate are expressed in the Constitution and statutes, and judicial interpretation thereof, as well as in congressional and committee rules as interpreted and applied by presiding officers and the courts.

The authority of Congress to investigate has been interpreted to derive from article I, section 1, stating that, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a

Senate and a House of Representatives." Consequently, the authority to investigate is necessarily limited by the authority to legislate.<sup>(19)</sup>

A review of criminal contempt proceedings provides a comprehensive overview of limits of authority to investigate including legislative purpose,<sup>(20)</sup> pertinence of investigation thereto, procedural regularity of hearings,<sup>(1)</sup> and rights of witnesses.<sup>(2)</sup>

The statute which makes failure to testify a crime, 2 USC §192, provides that the question must be "pertinent to the subject under inquiry." Pertinence is a matter of law<sup>(3)</sup> and does not depend upon

18. See §2.20, *supra*, for a discussion of the resolution of inquiry.

19. See, for example, *Barenblatt v U.S.*, 360 U.S. 109, 111 (1959) in which Mr. Justice Harlan stated, "The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." See also Lovell, G. B., *Scope of the Legislative Investiga-*

*tional Power and Redress for Its Abuse*, 9 Hastings L. J. 276 (1957).

20. See §1, *supra*, for a discussion of authority to investigate and legislative purpose.

1. See §8, *infra*.

2. See §§9 through 14, *infra*.

3. *Braden v United States*, 365 U.S. 431 (1961); and *Sinclair v United States*, 279 U.S. 263 (1929).